

No. 06-55750
No. 06-56869

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**COMITE DE JORNALEROS DE REDONDO BEACH;
NATIONAL DAY LABORER ORGANIZING NETWORK,**

Plaintiffs – Appellees,

v.

CITY OF REDONDO BEACH,

Defendant – Appellant

On Appeal from the United States District Court
for the Central District of California
Case No. CV 04-9396 CBM

**BRIEF OF *AMICI CURIAE* NATIONAL DOMESTIC WORKER
ALLIANCE, NATIONAL EMPLOYMENT LAW PROJECT,
RESTAURANT OPPORTUNITIES CENTER – UNITED, AND
RIGHT TO THE CITY IN SUPPORT OF APPELLEES’ PETITION
FOR REHEARING EN BANC**

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Pursuant to Fed. R. App. Proc. 26.1, the *Amici* make the following disclosure:

1. Is the party a publicly held corporation or other publicly held entity?

No.

2. Is the party a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity?

No.

3. Is there any other publicly held corporation, or other publicly held entity, that has a direct financial interest in the outcome of the litigation?

No.

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STATEMENT OF INTEREST OF AMICI CURIAE

The National Employment Law Project (NELP) is a non-profit legal organization with 40 years of experience advocating for the employment and labor rights of low-wage and contingent workers. NELP seeks to ensure that all workers, and especially the most vulnerable, have access to good jobs to attain economic security and receive workplace protections guaranteed in our nation's labor and employment laws. Protecting day laborers' First Amendment rights to use quintessential public forums for a variety of expressive activities, including employment-related speech is part of that mission. NELP has litigated and participated as *amicus* in numerous cases addressing workers' rights.

The National Domestic Workers Alliance (NDWA) is a national alliance of over 27 domestic worker groups in 17 cities across the country. NDWA endeavors to improve the working and living conditions of domestic workers. Day laborers, like domestic workers, are many of our nation's lowest paid workers, asking for employment on public street corners to support themselves and their families. Day laborers, together with women who work as domestic workers, struggle to obtain economic security for their families. NDWA joins this brief to oppose the City of Redondo Beach's Ordinance, which criminalizes day laborers for doing nothing more

than speaking about their need for work to support themselves and their families.

Restaurant Opportunities Center United (ROC-U) is a national restaurant workers' organization that seeks to improve the working conditions of restaurant workers through promoting national policies, conducting national research on the restaurant industry, developing and providing technical assistance to restaurant worker centers, and engaging in direct action campaigns on streets and sidewalks across the United States. Restaurant Opportunities Center United joins this brief to oppose the Ordinance that prohibits one of the most vulnerable sectors of low-wage workers from exercising their First Amendment rights.

The Right to the City is a national alliance of 36 community organizations based in urban cities across the United States that have come together for economic, racial, gender and ecological justice. The Right to the City alliance believes that community members and residents contribute greatly to the fabric of society and communities. We have a right to our cities, to our communities, to public space and we should not be subjected to unjust laws, such as this case in California.

Amici submit this brief not to repeat the arguments made by the parties, but to bring to court's attention our perspectives of the realities of

day laborers and the significance of sidewalks for day laborers' to engage in a variety of expressive activities, including employment-related speech.

Amici submit this brief, with the consent of all parties, pursuant to Federal Rule of Appellate Procedure 29 and Circuit Rule 29-2.

This brief is being filed with the consent of all parties to this proceeding.

SUMMARY OF ARGUMENT

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Hague v. Committee for Indus. Organization, 307 U.S. 496, 515 (1939).

(a) It shall be unlawful for any person to stand on a street or highway and solicit, or attempt to solicit, employment, business, or contributions from an occupant of any motor vehicle. For purposes of this section, “street or highway” shall mean all of that area dedicated to public use for public street purposes and shall include, but not be limited to, roadways, parkways, medians, alleys, sidewalks, curbs, and public ways.

Redondo Beach Municipal Code § 3-7.1601.

For the length of our country’s existence, sidewalks have been a public space. In good economic times, and particularly in bad times, they have been a place for the impoverished to express dire economic conditions and their need to work. Likewise, the streets and sidewalks have been critical ground for labor education, agitation, pickets, protests, and appeals to passersby, including motorists, to solicit support in labor organizing campaigns.

Our nation's history, traditions, and jurisprudence set aside the sidewalks as an essential setting for the exchange of ideas, regardless of their popularity or the popularity of the messenger. This is particularly true for those who do not have the economic means to access other forms of communication. Given today's economic and political climate, day laborers are the quintessential example of jobless members of our society who most need the sidewalks to communicate, but whose message and presence may be unpopular with many.

On its face, the Redondo Beach ordinance prohibits constitutionally protected speech on the public sidewalk. The heavy gloss placed on it by the Ninth Circuit panel majority renders the law all the more confusing for the public, day laborers and police. The decision, if allowed to stand, threatens to unleash a torrent of restrictions on sidewalk speech, in particular by disfavored speakers or on controversial topics, under the guise of protecting drivers from distractions.

En banc review of the panel's decision is needed to uphold accepted First Amendment jurisprudence.

ARGUMENT

I. PUBLIC PLACES ARE TRADITIONAL FORUMS FOR WORKERS TO GATHER AND COMMUNICATE WITH THEMSELVES, THE PUBLIC, AND PROSPECTIVE EMPLOYERS.

Since ancient times, public spaces have been used for public communications of many kinds, including debates about jobs and the economy, and for matching workers needing jobs with employers needing workers. DON MITCHELL, *THE RIGHT TO THE CITY: SOCIAL JUSTICE AND THE FIGHT FOR PUBLIC SPACE* 131 (2003). This rich tradition, which dates at least to Biblical times, was brought to the United States with the first European immigrants.¹ In 1834, Irish immigrant day laborers used the streets of New York City to find work, and in the 1850s, day laborers lined up along the city's docks and ports for a chance at getting hired for the day. Gregg W. Kettles, *Day Labor Markets and Public Space*, 78 *UMKCL.REV.* 139, 151-153 (2009). In the railroad hub of Chicago, men looking for work would meet "man catchers," labor agents who often stood on the street to solicit prospective laborers for work around the region. *Id.*

¹ In Fifth century Athens, a part of the agora was set aside as a place for workers and employers to meet. TOMÁS MARTINEZ, *THE HUMAN MARKETPLACE* 7 (1976). Martinez notes that day labor is described in Matthew, 20:1-20:15. *Id.* at 7-8.

During the Great Depression, the survival of an enormous class of Americans depended on their right to seek work in public places. In 1933, forty million men, women, and children lived without benefit of normal income. RICHARD O. BOYER, *LABOR'S UNTOLD STORY* 251 (United Electrical, Radio & Machine Workers of America, 3d ed. 1997) (1955). Hoovervilles, where many unemployed gathered to live, became a feature of American cities. *See* FRANKLIN FOLSOM, *IMPATIENT ARMIES OF THE POOR: THE STORY OF COLLECTIVE ACTION OF THE UNEMPLOYED 1808-1942* 277 (1991).

Through their very presence, Hooverville residents communicated not only their own economic condition, but also the economic condition of the country as a whole. Their presence signaled to the public the need for social and political change which helped make possible President Roosevelt's New Deal.

Throughout our nation's history, workers have fought to assert their First Amendment right to educate, agitate, and organize on city streets and sidewalks.² During the height of the Great Depression, the landmark

² In its attempts to organize hobo workers in the early 20th Century, the Industrial Workers of the World (IWW) engaged in free speech fights up and down the Pacific coast, from Aberdeen, Washington to San Diego, California. JOSEPH G. RAYBACK, *A HISTORY OF AMERICAN LABOR* 244 (1966). The IWW's targets were city ordinances regulating public speech,

Supreme Court decision of *Hague v. Committee for Indus. Organization*, 307 U.S. 496 (1939) affirmed the importance of public forums for labor related speech. In *Hague*, Court affirmed the CIO's right to distribute information, including workers' rights pamphlets, in public places, asserting that "...it is clear that the right peaceably to assemble and to discuss these topics, and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States which the [Fourteenth] Amendment protects." *Id.* at 511.

Day laborers today assert the same right affirmed by *Hague*, communicating to the public their economic plight and their dire need for employment. Laws that target these groups jeopardize core speech rights.

II. THE REDONDO BEACH ORDINANCE IGNORES THE IMPORTANCE OF DAY LABOR TO THE ECONOMY AND THE IMPORTANT CONTENT OF DAY LABORERS' SPEECH. THE ORDINANCE ELIMINATES THE ONLY PRACTICAL CHANNELS OF COMMUNICATION FOR DAY LABORERS, AND IMPERMISSIBLY PROHIBITS SIDEWALK SOLICITATION.

A. Day labor fills a niche labor market, providing workers with jobs and employers with a workforce.

Today, in cities across the United States, day laborers gather on sidewalks and street corners. Every day some 117,600 workers – 40,000 in

laws that were often based on supposed concerns for congestion or traffic.
Id.

California -- search for day labor jobs or work as day laborers. Abel Valenzuela, Jr., Nik Theodore, Edwin Melendez, & Ana Luz Gonzalez, *On the Corner: Day Labor in the United States*, Technical Paper, UCLA Center for the Study of Urban Poverty (2006), at i. Because they are predominantly recent immigrants, poor, and often homeless, they are marginalized from mainstream society. *See* Valenzuela, Jr. et. al., at 12-19.³

Nationally, there is a growing trend of reliance on a “contingent” workforce which has given rise to the expansion of day labor. Jobs in many industries, including agriculture, janitorial, garment, and construction are subcontracted out to the lowest bidder. Jennifer Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize?*, 22 N.Y.U. REV. L. & SOC. CHANGE 557, 558, 568-70 (1996). The precarious nature of work has meant more competition for short-term jobs in a volatile labor market. Day labor fills a niche in many industries’ increasing demand for flexibility. For many homeowners and renters, day laborers have replaced the “handy-man” of other times, performing a variety of home improvement, repair, and landscaping jobs that a two-wage earner household cannot afford the time to do itself, but can afford the money to hire out. Kettles at 158-59.

³ *See also* Nicholas Walter, Philippe Bourgois, H. Margarita Loinaz, & Dean Schillinger, *Social Context of Work Injury Among Undocumented Day Laborers in San Francisco*, JOURNAL OF GENERAL INTERNAL MEDICINE (March 2002), at 5-6.

For the workers themselves, at its most basic level, day labor provides a daily chance to avoid destitution. Day labor provides laid-off industrial workers and new immigrants alike the chance to earn cash wages, acquire work experience and skills, develop employer contacts, and gain a foothold in more mainstream, full-time employment. *See* Valenzuela, Jr. et al. at 1-2. In the current recession, tens of thousands of newly unemployed and under-employed workers are joining the day labor market. *Id.* at 20-21; Drew Hinshaw, *In quest for jobs, more Americans join ranks of day laborers*, THE CHRISTIAN SCIENCE MONITOR, February 23, 2010, at <http://www.csmonitor.com/layout/set/print/content/view/print/280769>.

B. Speech communicating a variety of ideas and social messages is inherent in day labor work.

Like Hooverville residents of past times, day laborers communicate a social, political, and economic message. *See Gresham v. Peterson*, 225 F.3d 899, 904 (7th Cir. 2000) (“Beggars at times may communicate important political or social messages in their appeals for money, explaining their conditions related to veteran status, homelessness, unemployment and disability”).

As is the case for other impoverished speakers such as beggars, day laborers are unemployed, often homeless, and socially isolated; their ability to feed and clothe themselves depends on their ability to communicate their

needs to the public through solicitation. Day laborers' very presence on the sidewalk communicates to the public that dire economic needs are not being met. In fact, presence on sidewalks is one of the few ways in which day laborers can communicate with mainstream society at all, given the public's often visceral negative reaction to the visibly impoverished.⁴

Further, day laborers on street corners engage in labor speech on a wide spectrum of other topics, including communicating among themselves about wages and working conditions, appealing to the public for support, and listening to "Know Your Rights" presentations by community advocates.⁵

C. The sidewalks are the only available forum for communication of day laborers' messages.

Access to public forums for solicitation speech is a necessary part of the day labor industry structure, with sidewalks and public ways functioning as practical and inexpensive marketplaces for the exchange of skills as well

⁴ See, e.g., Fernanda Santos, *Coming to Terms With the Men on the Corner*, N.Y. Times, December 17, 2006, at LI1, at <http://www.nytimes.com/2006/12/17/nyregion/nyregionspecial2/17Rday.html> ("their presence yields passionate responses from residents and local officials, often torn between those who embrace the workers and those who want to see them go").

⁵ See, e.g., Matt Olson, *Two Years after Katrina Workers Center Organizes Day Laborers in New Orleans*, LABOR NOTES, Sep 29, 2007, at <http://labornotes.org/node/1329> (New Orleans labor organizing of day laborers on curbsides and in parking lots).

as ideas. Where “‘there is no other effective and economical way for an individual to communicate his or her message,’ alternative methods of communication are insufficient.” *United Bhd. of Carpenters and Joiners of Am. v. NLRB*, 540 F.3d 957, 969 (9th Cir. 2008) (quoting *Edwards v. City of Coeur d’Alene*, 262 F.3d 856, 866 (9th Cir. 2001)).

Public forums are especially important for those who cannot afford to use other means of communication. See *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies*, 312 U.S. 287, 293 (1941) (“Peaceful picketing is the workingman’s means of communication.”). *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 n. 3 (9th Cir. 1990) (“An alternative has been held not ‘ample’ or adequate because, among other things, it is ‘more expensive’ than the prohibited means of communication.”).

Day laborers earn a monthly median wage of \$400-\$1,600. They lack the economic resources to post newspaper or radio advertisements of their need and availability for work. See Valenzuela, Jr. et. al. at 11-12. See *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 709 (1992), (“One of the primary purposes of the public forum is to provide persons who lack access to more sophisticated media the opportunity to speak.”).

The nature of day labor makes other means of solicitation unavailable. Day laborers cannot engage in door-to-door canvassing, telephone solicitation, or direct mailing since their work is too informal and transitory. Day laborers who are computer illiterate or limited English-proficient cannot post internet advertisements or solicit work over the phone. Parking lots near locations where day laborers congregate offer no alternative means of communication because business owners do not tolerate day labor speech in their privately owned lots.⁶ Nor are they necessarily required to do so. *Comite De Jornaleros De Redondo Beach v. City of Redondo Beach*, 475 F. Supp. 2d 952, 967 n. 9 (C.D. Cal. 2006); *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979). Alternatives like door-to-door canvassing are not viable and can often be dangerous because of the public's antagonism toward impoverished immigrants.⁷

⁶ See, e.g. Shelby Grad, *Frustrated Residents have day laborers at Home Depot arrested*, LA TIMES, May 31, 2009, at <http://latimesblogs.latimes.com/lanow/2009/05/frustrated-residents-arrest-day-laborers-at-home-depot.html>; *Police arrest day laborer at Monrovia store's parking lot*, SAN GABRIEL VALLEY TRIBUNE, April 23, 2010, at http://findarticles.com/p/news-articles/san-gabriel-valley-tribune/mi_8067/is_20100423/police-arrest-laborer-monrovia-stores/ai_n53274627/

⁷ See Southern Poverty Law Center, *Anti-Latino Hate Crimes Rise for Fourth Year in a Row*, Oct 29, 2008, at

D. The ordinance is an impermissible prohibition on day labor speech because it singles out solicitation speech on sidewalks for undue restriction.

Courts have uniformly recognized that sidewalks are quintessential public forums for expressive activities, including employment-related speech. As this court recognized in a case largely relied upon by the *Redondo Beach* majority, "...there are indeed substantial differences in nature between a street, kept open to motorized vehicle traffic, and a sidewalk or public park. A pedestrian ordinarily has an entitlement to be present upon the sidewalk... and thus is generally free at all times to engage in expression and public discourse at such locations." *Acorn v. City of Phoenix*, 798 F.2d 1260, 1267 (9th Cir. 1986). This is so because the use of parks and sidewalks for expressive activity usually does not implicate other important governmental interests. *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1022 (9th Cir. 2009). The Supreme Court has consistently upheld the right of the citizenry to use these public forums for public discourse: "Given the importance of these locales, we cannot countenance the view that individuals who choose to enter them, for whatever reason, are to be protected from speech and ideas those individuals

<http://www.splcenter.org/blog/2008/10/29/anti-latino-hate-crimes-rise-for-fourth-year/>

find disagreeable, uncomfortable, or annoying.” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910-911 (1982).

The panel departs from this precedent by allowing select categories of speech on sidewalks to be restricted based on its perceived impact on those in the streets. Yet neither the majority nor the city explain how the solicitation of employment, business, or contributions poses a greater risk to traffic safety than other types of solicitation freely permitted by the Ordinance – e.g., solicitation of votes or ballot signatures. *See Weinberg v. City of Chicago*, 310 F.3d 1029, 1039 (7th Cir. 2002) (rejecting City’s reliance on traffic rationale for selectively targeting peddling of merchandise on sidewalks near sports stadium but leaving unregulated other speech, concluding that “the City of Chicago’s inconsistent approach does not comport with its interests in maintaining traffic congestion.”). Moreover, the majority does not explain why the enforcement of the numerous traffic laws on the books would not address those concerns. The reality is that the city, instead of targeting the drivers that create these traffic concerns, has criminalized day laborer speech in order to sweep these “undesirable” workers from sidewalks.

The majority’s construction of the Redondo Beach ordinance creates confusion that will lead to First Amendment violations.

The plain terms of the Redondo Beach ordinance criminalize the solicitation of business, employment, or contributions, regardless of the manner or medium of the solicitation. Recognizing that such a broad anti-solicitation ordinance would be plainly unconstitutional, the majority writes its own version of an anti-solicitation ordinance that would pass muster. However, the majority's construction raises more questions than it answers. According to the majority, the ordinance prohibits "in person demands requiring an immediate response." The majority does not offer any guidance on what constitutes such a "demand." Is any communication with a car prohibited? Can a person on a sidewalk respond if a driver initiates a conversation? These uncertainties will inevitably drive day laborers, businesses and charitable organizations from sidewalks for fear that any expressive activity may attract the attention of drivers and lead to arrest.

Further, the majority assures that the ordinance, despite its plain wording, includes a litany of exceptions to expressive activities that are indisputably protected by the First Amendment. For example, the majority explains that the ordinance does not prohibit "staring at or approaching legally parked cars, carrying signs, or shouting slogans." Slip. op. at 8382. Nor does it prohibit "the unilateral distribution of leaflets," *Id.*, or "passing out handbills asking car drivers or passengers to contribute by mail to a

charity or cause.” *id.* at 8371. It offers these assurances, despite the plain language of the ordinance, which broadly prohibits solicitation of the occupants of “any motor vehicle.”

Anti-solicitation ordinances specifically focused on day labor have become ubiquitous across the country, and have engendered intense public debate and litigation.⁸ Just as the city of Redondo Beach used a Phoenix ordinance as its model, the majority’s decision gives a green light to copy-cat ordinances across the country.⁹ But the decision offers no guidance to cities that borrow wholesale the language of Redondo Beach’s ordinance. Will such ordinances mean what they literally say? How will residents have access to the edited version of the ordinance put forth by the majority? Reasonable police officers may well believe it unlawful, as the dissent argues, for residents to advertise high school carwashes, to sell newspapers,

⁸ See Editorial, *Day Laborers and Free Speech*, N.Y. TIMES, Jun 13, 2010, at <http://www.nytimes.com/2010/06/14/opinion/14mon2.html> (urging en banc review of the *Redondo Beach* decision); *Lopez v. Cave Creek*, 559 F.Supp.2d 1030 (D. Ariz. 2008), *CHIRLA v. Burke*, 2000 WL 1481467 (C.D.Cal. 2000) and other cases cited in Petition for Rehearing en Banc, pp 2-3.

⁹ See The Bureau of National Affairs, *Ninth Circuit Overturns Injunction Against City's Day Laborer Solicitation Ban*, WORKPLACE IMMIGRATION REPORT, June 14, 2010 at <http://emlawcenter.bna.com/pic2/em.nsf/id/BNAP-86QL53?OpenDocument> (quoting the Redondo Beach City Attorney as affirming that the ordinance “provides a great blueprint for other cities to copy, word-for-word...”).

to carry placards announcing “going out of business” sales, or to hail a cab from a sidewalk.

But the real impact of the ordinance will be felt, as was intended, by day laborers themselves. As the Redondo Beach City Attorney has indicated, the ordinance was enacted in response to local complaints about day laborers’ presence along city sidewalks. *See Slip op.* at 8388 (Wardlaw, J., dissenting). They will risk arrest if a sign directed towards pedestrians is seen by a motorist. They will risk arrest for any gesture, motion or speech that appears to an officer to be announcing the need and availability for work. Such is already a reality in Redondo Beach, where day laborers have been arrested for simply being on the sidewalk and approaching a stopped vehicle. *See Slip op.* at 8401 (Wardlaw, J., dissenting). If the majority panel’s decision is upheld, day laborers will be harassed, arrested, and further marginalized in cities around the country, and a century of First Amendment jurisprudence and labor struggles will be upended.

Dated: July 12, 2010

NATIONAL EMPLOYMENT LAW
PROJECT

By: /s/ Rebecca Smith

Rebecca Smith
Attorney for *Amici*

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the attached brief complies with the page and type-volume limitations set forth in the Court's July 1, 2010 Order letter because it is proportionately spaced, has a typeface of 14 points, and contains 3,641 words.

By: /s/Rebecca Smith
Rebecca Smith
Attorney for *Amici*

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